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No. 88-1770

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITION FOR CERTIORARI

This brief in support of the petition for certiorari is submitted with the written consent of all parties filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of the Nation's private employer-sponsored employee benefit system. The APPWP has more than 400 members, including many large and small plan sponsors, as well as such plan support organizations as investment firms, banks, insurers, actuarial firms, and other professional benefit organizations.

Collectively, the APPWP's members have substantial experience in the design and administration of benefit plans of all types. APPWP members either sponsor plans themselves or provide services to more than 70,000 benefit plans; these plans collectively cover millions of employees.

The issues presented by this case are of critical importance to the members of the APPWP. The decision below has broad implications for the ability of employers to provide severance pay benefits to non-retirement-eligible workers. Because it prohibits integration of severance and pension benefits, the decision can be expected to reduce significantly the scope of severance programs for both younger and older workers.

Moreover, the decision below injects substantial confusion into the design and administration of employee benefit plans. In considering two critical concepts common to the Employee Retirement Income Security Act ("ERISA") and the Age Discrimination in Employment Act ("ADEA"), the court below adopted ADEA definitions of those concepts that are contrary to their established meaning under ERISA. As a result of those conflicting definitions, plans fully complying with ERISA may be invalidated under complementary provisions of the ADEA. Because the decisive resolution of these issues is of great significance to the APPWP and its members, it urges a grant of certiorari in this case.

STATEMENT

The APPWP adopts the statement of facts set forth in the petition for certiorari. This statement is limited to the facts most important to the APPWP's position in this brief.

In the 1960's Westinghouse Electric Corporation and its unions began to develop a benefits program for employees involuntarily terminated as a result of plant

closings or relocations. *See generally* Appendix to the Petition ("Pet. App.") at 54a-59a. Prior to that time the only terminated employees who had any form of income protection were those eligible for retirement benefits, including early retirement benefits, under the Westinghouse pension plan. At the unions' request, however, Westinghouse created a more limited severance benefit plan for employees ineligible for retirement. *See id.* at 54a. In subsequent years, the pension plan was amended to include special early retirement eligibility to protect workers near retirement who were involuntarily terminated. *See id.* at 59a.

It is undisputed that Westinghouse viewed the severance and pension plans as forming an integrated benefits program and implemented them accordingly so that all employees with sufficient time on the job would be afforded some type of income protection in the event of involuntary termination. *Id.* at 19a-20a. To assure a rational allocation of benefit resources between retirement-eligible and non-eligible employees, the plan provided, prior to 1982, that employees eligible for immediate retirement benefits (including special early retirement benefits) were not also eligible for severance benefits. *Id.* at 54a-57a. After that date, however, the benefits program allowed retirement-eligible employees to elect severance benefits or early retirement, but did not allow them to choose both. *Id.* at 57a-59a.

In considering whether Westinghouse's plan violated section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), the court below apparently "accept[ed] Westinghouse's contention that the value of early retirement benefits is actuarially greater than or equal to the value of [severance pay] plus a deferred pension." Pet. App. at 16a. However, the court of appeals rejected the claim that the Westinghouse severance and pension benefits were integrated and determined that the severance program should be considered in isolation.

In finding no integration, the court of appeals acknowledged but completely disregarded undisputed evidence showing that: (1) the two benefits had a common purpose of providing employees with a source of income maintenance after involuntary termination; (2) the pension and severance pay plans were negotiated contemporaneously for twenty-five years; (3) pension eligibility requirements were continually liberalized to maximize the number of employees qualified for early retirement; and (4) severance pay benefits were increased contemporaneously with increases in the value of pension and insurance benefits. *Id.* at 25a. In the Third Circuit's view, severance and pension benefits were not integrated because they were perceived as serving different purposes and because the retirement benefits were vested, while severance benefits were not. *Id.* at 17a, 27a. In finding the 1982 plan—which provided pension eligible employees the option of selecting either severance or pension benefits—violative of section 4(a)(1), the court of appeals held that "severance pay is a fringe benefit for which vested early or selected retirement benefits cannot be a substitute." *Id.* at 26a. Thus, the Third Circuit's decision holds, as a matter of law, that severance benefits cannot be integrated with pension benefits and calls into question whether a non-vested benefit can ever be integrated with any vested benefit for purposes of the ADEA.

The Third Circuit also concluded that severance pay plans cannot qualify as "employee benefit plans" entitled to exemption under section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). Pet. App. at 27a-29a. The court of appeals held, again as a matter of law, that severance pay is a mere "fringe benefit," not an employee benefit plan that satisfies section 4(f)(2). *Id.* at 26a. That conclusion of law is inconsistent with definitions of "employee benefit plan" under the provisions of ERISA.

REASONS FOR GRANTING THE WRIT

I. IF THE THIRD CIRCUIT'S DECISION IS ALLOWED TO STAND, IT WILL HAVE AN IMMEDIATE ADVERSE IMPACT ON EMPLOYERS AND EMPLOYEES BY DISRUPTING SEVERANCE BENEFIT PROGRAMS

The result reached by the Third Circuit is antagonistic to the interests of employees and employers alike and contravenes the express congressional interest in protecting employees affected by plant closings.[1] For example, a recent Bureau of Labor Statistics report estimates that during the first half of this decade, an average of 2.2 million American workers lost their jobs each year because of plant closings or mass layoffs.[2] For employees not yet eligible for retirement, such closings and layoffs can mean economic disruption or disaster. Thus, private efforts to provide severance pay benefits to maintain the incomes of non-retirement-eligible employees is an obvious benefit to the nation's workers.

Like Westinghouse, thousands of employers have negotiated agreements or unilaterally established programs that extend a more limited form of income protection to non-pension-eligible workers whose employment is terminated through no fault of their own. A recent survey shows that approximately forty percent of the private collectively-bargained benefit plans imposing restrictions on receipt of benefits deny severance benefits to employees

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[1] Congress has recently recognized that plant closings and force reductions can have devastating effects on employees. Workers Adjustment Retraining and Notification Act of 1988, Pub. L. 100-379, 102 Stat. 890 (1988). That legislation required that employers provide notice to employees of planned plant closings. *Id.* at § 3(a).

[2] *See* F.W. Horvath, "The Pulse of Economic Change: Displaced Workers of 1981-85," *Monthly Labor Review* (June 1987) U.S. Department of Labor, Bureau of Labor Statistics, and Appendix III.

who are eligible for pensions.[3] By defining these "severance benefits" as an alternative to pension benefits, rather than a supplement to them, employers are able to design a rational and coordinated program that extends some form of income protection to a broader group of employees. This policy of benefit "integration" serves an important objective—expressly recognized by ERISA—of encouraging adoption of pension plans and at the same time encouraging that benefit costs be controlled to permit their extension to the greatest number of workers. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515-17 (1981).

The same policy of benefit integration condemned by the Third Circuit is regularly used by the federal government with respect to its own employees. Federal employees have been protected from age discrimination since 1974. 29 U.S.C. § 633a(a). Yet Congress has broadly prohibited the payment of severance benefits to federal employees who are entitled to retirement benefits. *See* 5 U.S.C. § 5595(a)(2)(B)(iv); *see also* 14 U.S.C. §§ 286(b), 327(B); 33 U.S.C. § 853h(e).[4] Moreover,

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[3] *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 1144, at 53:3 (1989).

[4] 5 U.S.C. § 5595(a)(2)(B)(iv) prohibits the payment of severance benefits to

> an employee who is subjected to . . . any . . . retirement statute or retirement system applicable to an employee as defined by section 2105 of this title or a member of a uniformed service and who, at the time of separation from the service, has fulfilled the requirements for immediate annuity under such a statute or system.

5 U.S.C. § 2105(a) in turn defines the affected employees as follows:

> (a) For the purpose of this title, "employee" . . . means an officer and an individual who is—
>
> (1) appointed in the civil service by one of the following acting in an official capacity—
>
> (A) the President;

Congress left that prohibition intact after application of the ADEA to federal workers in 1974, despite repeated legislative reconsideration of section 5595.[5] As a result, federal workers generally are precluded from collecting both retirement benefits and severance pay.[6]

Under the Third Circuit's decision on benefit integration, however, provision of severance benefits to private sector employees will be threatened.[7] Employers that

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(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

[5] After its enactment in 1967, section 5595 was amended in 1978, 1979, 1980, and 1988 without modification of the prohibition on payment of severance benefits to retirement-eligible federal employees. Congress has also enacted other such prohibitions since the effective date of 29 U.S.C. § 633a(a). *See, e.g.*, 10 U.S.C. §§ 1186(b), (c); 10 U.S.C. §§ 1174(e), (h).

[6] As this Court has recognized, it cannot lightly be assumed that Congress intended to penalize private employers for a practice that the government itself employs. *See Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 90-91 (1973).

[7] The adverse impact of the Third Circuit's decision is illustrated by the first district court decision applying its holding. In *EEOC v. USX, Corp.*, 19 E.B.C. 2341 (E.D. Pa. 1989), the court reluctantly invalidated a benefits program that included an offset of pension and severance benefits, stating that it would have reached a different result had it not been controlled by the decision below.

In contrast to the Third Circuit, other federal courts have concluded that the ADEA permits employers to allocate income main-

previously provided special income protection for employees affected by plant closings will be put to a difficult choice. They may continue to make severance pay benefits available to their employees only by providing a supplemental benefit to those who already are entitled to a pension. However, that choice would come at enormous cost to employers and might prove prohibitive for contracting industries facing substantial force reductions. Thus, the foreseeable result of the Third Circuit's decision will be the elimination or reduction of severance benefits that already exist, as well as the creation of a significant disincentive for additional employers considering adoption of such programs.[8]

This result would not serve the ADEA objective of protecting the employment rights of older workers. It would plainly be contrary to the interests of employees, who, without regard to age, benefit from more comprehensive income loss protection. At different points in

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tenance protection among retirees and non-pension eligible employees. In *Britt v. E.I. DuPont de Nemours & Co.*, 768 F.2d 593, 594 (4th Cir. 1985), the Fourth Circuit squarely held that "no discrimination within contemplation of the ADEA resulted to pension-eligible employees" whose eligibility for severance pay was conditioned upon deferral of certain pension benefits they would otherwise have received. Similarly, the court in *Abenante v. Fulflex, Inc.*, 701 F. Supp. 296, 300 (D.R.I. 1988), *appeal pending*, No. 89-1179 (1st Cir. filed Jan. 30, 1989), found no ADEA violation in a requirement that the present value of vested pension benefits be deducted from severance benefits paid retirement-eligible workers. *See also Khan v. Grotnes Metalforming Systems, Inc.*, 679 F. Supp. 751, 762 (N.D. Ill. 1988); *EEOC v. Firestone Tire & Rubber Co.*, 650 F. Supp. 1561, 1567 (W.D. Tenn. 1987).

[8] The impact of the Third Circuit's decision is to skew the allocation of benefit resources so that a disproportionate amount of each benefit dollar is devoted to one unique situation—benefits available to pension-eligible employees in a plant closure. Ironically, that result may injure older workers, rather than benefiting them, since the added costs mandated by the Third Circuit may be reflected in reduced improvements to other generally available benefit programs, including pensions.

their careers, employees may be protected by different aspects of a broad integrated program. *See, e.g., Patterson v. Independent School District #709*, 742 F.2d 465, 468 (8th Cir. 1984). Indeed, older workers who lack sufficient service credit for pension entitlement may be protected *only* by severance benefits.

In light of the threatened impact of the Third Circuit's decision on thousands of employee benefit programs, review by this Court is warranted.

II. CONCEPTS COMMON TO ERISA AND THE ADEA MUST BE CONSTRUED AND APPLIED IN A CONSISTENT MANNER

The decision below turns on the definition of two key concepts common to both ERISA and the ADEA: "plan integration" and "employee benefit plan." Although Congress intended that these statutes be consistently construed and applied, the court below defined these concepts under the ADEA in a manner directly contrary to their established meanings under ERISA. The Third Circuit decision thus subjects employers to the risk that a plan designed to comply with complementary provisions of ERISA and the ADEA will be held invalid under statutory definitions unique to the ADEA.

The legislative history of the ADEA makes clear Congress' intent that ERISA and the ADEA be implemented consistently. As first proposed, the ADEA did not contain a comprehensive exemption for employee benefit plans.[9] As a result the provision drew criticisms from legislators and others during Senate hearings. *See Age*

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[9] The original version of section 4(f) provided:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act.

113 Cong. Rec. 2794 (1967).

Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor & Public Welfare, 90th Cong., 1st Sess. 27, 29-30, 279-80, 295-97, 315-17 (1967). Senator Javits advocated replacement of the proposed language with an amendment that made it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7077 (1967). He did so because, in his view, "the age discrimination law is not the proper place to fight this particular battle." *Id.* at 7076. The particular battle to which Senator Javits referred was the regulation of employee benefit plans. Instead, the "proper place" was the "recently introduced . . . comprehensive bill"—a proposal that became ERISA—designed to "deal with this problem." *Id.*

Thus, from the outset the ADEA recognized that separate legislation (ERISA) would be the primary source of regulation for employee benefit plans, and it created a corresponding ADEA exemption for plans subject to ERISA.[10] The necessity for coordinating these complementary statutory enactments has been explicitly reaffirmed in subsequent amendments to ERISA and the ADEA. In 1978, while considering proposals to raise the upper age limit on the ADEA's coverage, members of Congress expressed concern that the proposed amendment

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[10] Fundamental principles of statutory construction confirm this result, requiring that terms used in interrelated statutes be interpreted consistently. *See* N. Singer, *Sutherland Statutory Construction* (4th ed.) § 51.03 (1984 & Supp. 1989); *see also Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985); *Crabtree v. Baptist Hospital of Gasden, Inc.*, 749 F.2d 1501, 1503 (11th Cir. 1985); *Lopez v. Bulova*, 582 F. Supp. 755, 763 (D.R.I. 1984).

could substantially increase benefit costs.[11] Only after receiving the advice of the Department of Labor that the proposed amendments would not require accrual of additional pension benefits by employees who worked beyond the plan's normal retirement date and "would not interfere with any of the provisions of ERISA"[12] did the Committee report the amendments to the Senate.[13] This legislative history evidences a clear intent to coordinate the two statutes.

In 1986, Congress added new ADEA section 4(i), 29 U.S.C. 623(i), which prohibits the cessation of benefit accruals under an "employee pension benefit plan" because of the attainment of any age. It contemporaneously amended ERISA and the corresponding provisions of the Internal Revenue Code ("Code") to include nearly identical statutory language.[14] In so amending the ADEA, Congress mandated that "the provisions of ADEA, ERISA, and the [Internal Revenue] Code . . . are to be interpreted in a consistent manner."[15] Moreover, Congress specifically instructed the Secretary of Labor, the

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[11] *See Von Aulock v. Smith*, 720 F.2d 176, 182 (D.C. Cir. 1983) (citing S. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 508).

[12] Letter from Donald Elisburg, Assistant Secretary, Department of Labor, to Senator Harrison Williams, *reprinted in* 1978 U.S. Code & Cong. Admin. News at 517.

[13] The relevant House Committee report also reflected the fact that the proposed amendments were designed to complement ERISA requirements. *Von Aulock*, 720 F.2d at 183 (citing H.R. Rep. No. 527, 95th Cong., 1st Sess. 9 (1977)).

[14] ERISA §§ 204(b)(1)(H), 204(b)(2)(A), 29 U.S.C. §§ 1054(b)(1)(H), (b)(2)(A); Code sections 411(b)(1)(H), 411(b)(2).

[15] The Conference report stated that:

> The conferees intend that the provisions of ADEA, ERISA, and the Code that are amended to prevent the reduction or cessation of benefit accruals on account of the attainment of age are to be interpreted in a consistent manner and do not

Secretary of the Treasury, and the EEOC to consult and coordinate with one another to insure the issuance of consistent rulings and regulations pursuant to these statutory provisions. Conference Report at 382.

The 1986 amendments went beyond an insistence that terms common to ERISA and the ADEA be interpreted consistently. Congress also recognized the preeminent role of ERISA in regulating employee benefit plans:

> It is the intention of the conferees, in adopting the amendments to ADEA (new sec. 4(i)), that the requirements contained in section 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan (as defined in sec. 3(2) of ERISA)[16] shall constitute the entire extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans on or after the effective date of such provisions . . . .

Id. Congress thus anticipated that in order to maintain consistency in the interpretation of terms common to ERISA and the ADEA, those terms would be defined as provided in ERISA.

The decision in this case demonstrates the critical need for such coordination of the application of common terms. In concluding that the Westinghouse plan violated section 4(a)(1) of the ADEA, the Third Circuit formulated "ADEA definitions" for the concepts of "integration" and "employee benefit plan" that are completely at odds with the established meaning of those concepts under ERISA.

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intend any differences in language in the provisions to create an inference that a difference exists among such provisions.

Conference Report Providing for Reconciliation Pursuant to Section 2 of the Concurrent Resolution on the Budget for Fiscal Year 1987, H.R. Rep. No. 1012, 99th Cong., 2d Sess. 378-79 (1986) [hereinafter, "Conference Report"].

[16] Section 4(i) of the ADEA expressly incorporates the ERISA definition of employee pension benefit plan. 29 U.S.C. § 623(i)(9)(A).

A. The Decision Below Defined "Plan Integration" Under the ADEA in a Manner Directly Contrary to its Established Meaning Under ERISA

Under ERISA, plan integration is an important tool that encourages employers to adopt pension plans and enables them to allocate benefit resources rationally among the greatest number of people. This Court recognized in its unanimous decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that ERISA expressly authorizes integration as a means of containing benefit costs and assuring the delivery of benefits to the greatest number of employees. The Court there observed that prohibiting integration could injure employees by slowing the growth of or eliminating certain benefits. *Id.* at 515 (citing H.R. Rep. No. 807, 93d Cong., 2d Sess. 69 (1974)).[17] The Court thus concluded that Congress approved plan integration to give "employers avenues for cutting the cost of their pension obligations." 451 U.S. at 517.

Alessi is significant here beyond its general endorsement of integration, however. It specifically concerned the integration of benefits that were designed to serve different purposes and that were both vested and nonvested—the very issues held by the Third Circuit to be decisive here. The specific benefits provision at issue in *Alessi* reduced a retired employee's pension benefits by an amount equal to any workers' compensation award for which the retired employee was eligible. *Id.* at 507. The

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[17] The Court noted:

> It is particularly pertinent for our purposes that Congress did not prohibit "integration," a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514.

Court rejected a claim that the challenged provisions effected a prohibited forfeiture of pension rights, holding that in light of that congressional endorsement of integration, offsets against pension benefits for workers' compensation awards should be allowed even though such awards served a very different purpose and were not vested. *Id.* at 516-17.

The Third Circuit's constricted definition of integration ignores both the congressional endorsement of integration and the long history of collective bargaining of integrated benefit plans. Indeed, this case exemplifies the situation Congress sought to avoid in approving integration, since denial of integration will necessarily create economic pressure to reduce or eliminate severance benefits. The Third Circuit's decision that the Westinghouse plan could not, as a matter of law, be integrated thus creates a significant inconsistency in the definition of "integration" under ERISA and the ADEA.

In contrast to the decision here, numerous lower courts have endorsed benefit integration in this context.[18] The Third Circuit itself recently affirmed the holding in *Vintilla v. United States Steel Corp.*, 606 F. Supp. 640, 643 (W.D. Pa. 1985), *aff'd mem.*, 782 F.2d 1033 (3d Cir.), *cert. denied*, 475 U.S. 1141 (1986), that ERISA permits the integration of pension and severance benefits. In addition, integration of vested and non-vested benefits has been accepted in other contexts. For example, the integration of pension benefits with social security benefits is expressly authorized in proposed regulations promulgated by the Internal Revenue Service ("IRS") to implement section 4(i) of the ADEA, as well as the corresponding provisions of ERISA and the Code. Prop. IRS Reg. § 1.411(b)-2(d)(2)(iii). These proposed regulations govern the interpretation of the ADEA, as well as

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[18] *See, e.g., Cipriano v. Board of Education*, 785 F.2d 51, 54-55 (2d Cir. 1986); *Britt*, 768 F.2d at 595; *Patterson*, 742 F.2d at 467; *Abenante*, 701 F. Supp. at 300.

the Code and ERISA. *See* preamble to IRS Proposed Rule on Continued Plan Accruals Past Normal Retirement Age, 53 Fed. Reg. 11876, 11878 (Apr. 11, 1988).

The Third Circuit thus ignored congressional, regulatory, and judicial authority to the contrary in holding as a matter of law that severance benefits could never be integrated with vested pension benefits. As a result, the court of appeals has injected substantial confusion into the integration issue and left employers virtually without guidance in negotiating and establishing plans governed by both ERISA and the ADEA.

B. The Third Circuit's ADEA Definition of "Employee Benefits Plan" Cannot Be Reconciled with the ERISA Definition of that Concept

The Third Circuit's delineation of the scope of the ADEA section 4(f)(2) exception for bona fide "employee benefit plans" also failed to take account of the established meaning of that term under ERISA. The Third Circuit concluded that severance benefits can *never* qualify as "employee benefit plans" within the meaning of that term in section 4(f)(2). Under ERISA, however, severance benefits are clearly "employee benefit plans," and, as such, are subject to that Act's substantial regulation. A severance plan may be either a pension or a welfare plan, but in either event, it is an "employee benefit plan" under ERISA. Section 3(3) of ERISA provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. § 1002(3). As used in that provision, the term employee *welfare* benefit plan includes a "plan, fund, or program . . . for the purpose of providing for its partici-

pants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment." ERISA § 3(1), 29 U.S.C. § 1002 (1). The term employee *pension* benefit plan includes a "plan, fund, or program which . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). Accordingly, Department of Labor regulations provide that a severance plan that pays benefits on account of the termination of an employee's service will be considered a *pension plan* unless it meets certain restrictive criteria, in which event it will constitute a welfare plan. 29 C.F.R. §§ 2510.3-1, 3-2. Under either of these subclassifications, severance pay is clearly an employee benefit plan for ERISA purposes.

This analysis of ERISA's terms is confirmed by the Court's recent decision in *Massachusetts v. Morash*, 57 U.S.L.W. 4429 (Apr. 18, 1989), which distinguished between employee benefit plans and certain compensation practices or fringe benefits, such as the payment of overtime pay, shift premiums, and pay while absent on account of illness. In holding that vacation pay generally constitutes a compensation practice that is not governed by ERISA, the Court made clear that "plans to pay employees severance benefits, which are payable *only* upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Id.* at 4431; *see also Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320, 325 (2d Cir. 1985), *aff'd mem. sub nom. Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986).[19]

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[19] In *Gilbert* the Second Circuit held that severance pay constitutes a benefit plan under ERISA. 765 F.2d at 325. The court of appeals incorporated practical considerations into its decision, noting that employers involved in substantial force reductions may owe a large amount in severance pay, and employee interests are protected if severance benefits are brought within ERISA. *Id.* at 326.

Even the EEOC has acknowledged that severance pay is not precluded from classification as an employee benefit plan. Despite taking the position in this case that severance plans are not subject to the protection of section 4(f)(2) of the ADEA, the agency is currently rethinking its position. In its Advance Notice of Proposed Rulemaking regarding a proposed rulemaking under section 4(f)(2), the EEOC specifically solicited comments on the following topics:

1. Which plans should be considered to be "employee benefit plans" under the ADEA; and

2. Should severance pay and/or sick pay plans be considered "employee benefit plans" under section 4(f)(2)?

53 Fed. Reg. 26789, 26790 (July 15, 1988).

The willingness of the Third Circuit to construe provisions common to ERISA and the ADEA without regard to established ERISA definitions and precedents is likely to disrupt benefit plan structure and administration. Clearly a severance pay plan designed to meet the definition of an "employee pension benefit plan" under ERISA would be subject to ERISA's comprehensive participation, vesting, and funding requirements. ERISA, Title I, Parts 2 and 3, 29 U.S.C. §§ 1052, 1053, 1082-85. Nevertheless, the Third Circuit's decision would deny that plan exemption under section 4(f)(2) because it would not constitute an ADEA "employee benefit plan."

The decision could also create turmoil for employers and plan administrators because an independent interpretation of the ADEA would call into question a host of pension plan provisions that are required or authorized by ERISA, but have a disparate impact on older employees. Without the protection of section 4(f)(2),

these provisions could violate the ADEA.[20] For example, section 401(a)(9) of the Code requires pension plans to begin to make benefit payments at age 70½ (subjecting the participants to tax liability for the payment), regardless of whether the participant has retired or requests such payments.[21] In addition, the Code provides that pension benefits may be reduced or offset by social security retirement benefits, Code section 401(a)(5)(D) and permits a social security supplement paid under a plan to terminate when an employee becomes eligible for social security benefits. Code section 411(a)(9); *see* ERISA § 204(b)(1)(G), 29 U.S.C. § 1054(b)(1)(G). Finally, the Code contains numerous requirements that limit the benefits of highly compensated employees, regardless of whether the affected employees are entirely or primarily within the protected class. *See, e.g.*, Code sections 401(a)(4), 410(b), 411(b)(1)(H)(v), 415.

Employers who must design a plan that applies to employees nationwide and conforms with requirements of both ERISA and the ADEA are provided no guidance, and considerable confusion, by the Third Circuit decision. Therefore, review by this Court is clearly warranted.

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[20] A hint of the potential for confusion and inconsistent rulemaking was graphically demonstrated when the EEOC issued proposed regulations under section 4(i) of the ADEA. 52 Fed. Reg. 45360 (Nov. 27, 1987). Those regulations were contrary to proposed rules subsequently published by the IRS under Code section 411(b). 53 Fed. Reg. 11876 (Apr. 11, 1988). Following a storm of controversy, the EEOC backed away from the position stated in its proposed regulations and indicated its intent to defer to the IRS in developing regulations in this area. *See* 54 Fed. Reg. 604 (Jan. 9, 1989).

[21] Similarly, Code section 401(a)(14) requires former employees to begin to receive benefits upon attaining the plan's normal retirement age, unless the employee elects otherwise. *See also* ERISA § 206(a), 29 U.S.C. § 1056.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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